86-975

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

October Term, 1986

BERNARD L. WILLIAMS,
Petitioner,

vs.

OVERTON MANOR EAST HOMEOWNERS ASSOCIATION, INC. EUGENE G. DOUGLASS; TENNESSEE HOUSING DEVELOPMENT AGENCY, and, NATIONAL MORTGAGE COMPANY.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the taking of petitioner's condominium or property under Tennessee's procedures by power of sale methodology, and with the aid and involvement of a state agency and judgment of a Tennessee court for possession of petitioner's property constitutes state action, or action under color of state law, to deprive him of his property without due process of law under the Fourteenth Amendment of the Constitution of the United States so as to subject the respondents to an action for redress under 42 U.S.C. Section 1983.

LIST OF PARTIES

The parties to this action are listed and styled herein in the same manner as in the Courts below:

Bernard L. Williams, Plaintiff and Petitioner,

—Overton Manor East Homeowners Association, Inc.,
Defendant and Respondent,

—Eugene G. Douglass, Defendant and Respondent,

—Tennessee Housing Development Agency,
Defendant and Respondent,

—National Mortgage Company,
Defendant and Respondent,

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No.

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BERNARD L. WILLIAMS,

Petitioner,

vs.

OVERTON MANOR EAST HOMEOWNERS ASSOCIATION, INC., EUGENE G. DOUGLASS; TENNESSEE HOUSING DEVELOPMENT AGENCY, and, NATIONAL MORTGAGE COMPANY.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Bernard L. Williams, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on September 16, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit as to which the writ of certiorari is sought is unreported and is reproduced as Appendix A to this petition. The written order of the District Court For The Western District of Tennessee that dismissed petitioner's complaint is likewise not reported, but it is also reproduced herein as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1986 (Appendix A). This petition is filed within Ninety (90) days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are: the Civil Rights Act of 1871, 42 U.S.C. Section 1983 (Reproduced as Appendix C hereto); The Acts of Tennessee by which notice of a sale of property is directed to be given, Tennessee Code Annotated 35-5-101 and Tennessee Code Annotated 35-5-107, reproduced hereto as Appendix D to this petition. The Tennessee Horizontal Property Act, Tennessee Code Annotated 66-27-101, et. seq., pertinent portions of which [66-27-107, T.C.A., and 66-27-116, T.C.A.] are appended hereto as Appendix E; Tennessee's statute on a party's right of redemption of real estate sold for debt: 66-8-101 T.C.A., (Appendix F), and, pertinent portions of Tennessee's statutory scheme on forcible entry and detainer actions: Tennessee Code Annotated Sections 29-18-119 and 29-18-133, (Appendix G).

CONSTITUTIONAL PROVISIONS INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive an person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment Fourteen, Constitution of the United States, Section 1. (Appendix H)

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1331, 28 U.S.C. Section 1335, 28 U.S.C. 2201, and 42 U.S.C. Section 1983 from plaintiff's complaint that he had been deprived of his property without due process of law. Plaintiff sought damages for the loss of his condominium, its contents and rents, along with a declaratory judgment that the procedures, customs, statutes, usage and law established by Tennessee are unconstitutional in the context of Tennessee's methodology in the taking of property by power of sale foreclosure.

Plaintiff, Bernard L. Williams, purchased a condominium in 1975 commonly known as 3046 St. Denis Place, Memphis, Tennessee. Condominium form of ownership was created in Tennessee in the year 1963 by the enactment of Tennessee's Horizontal Property Act, Tennessee Code Annotated 66-27-101, et. seq. During the period from 1975 through 1984 Plaintiff, Bernard L. Williams, became embroiled in a controversy with the continually new, or changing, set of directors, or management, of Overton Manor East Homeowners Association, Inc. over the correct charges or credits for assessments on his condominium. This was shown to be due to the fact that the association's records on these charges or credits were poor and very few. (R. 33)

The continuing disagreement between these two parties over the correct charges or credits for condominium assessments on plaintiff's unit ultimately culminated in Overton Manor's filing of a lien assessment notice in the Register's Office of Shelby County, Tennessee. Thereafter, the homeowner's association proceeded with its foreclosure by power of sale methodology of plaintiff's condominium on March 22, 1984.

The holding of the Court of Appeals in this case faults the loss of plaintiff's property on his failure to respond to three letters claimed to have been sent to him to which he never responded (Court of Appeals Opinion, Page Two). The record in this case however, clearly reflects that the plaintiff never received any notices himself that the homeowner's association had taken steps to foreclose and sell his condominium unit. Moreover, the record in this case plainly shows that the homeowner's association had a correct mailing address for plaintiff, (not the unit itself), to which it had recently had U.S. Mail delivered to plaintiff on other matters relating to his condominium unit, and even while it was filing and pursuing enforcement of its lien claim for condominium assessments on plaintiff's unit. Overton Manor obviously

failed to give Respondent, Eugene G. Douglass, the correct mailing address for petitioner when it proceeded to sell petitioner's condominium to enforce its lien claim.

In Tennessee, the means by which notice of a sale of land is given on foreclosing a trust deed, mortgage, or other lien, is directed to be by publication alone in a newspaper published in the county where the sale is being made: Tennessee Code Annotated 35-5-101 (Appendix D). The failure to follow this statute constitutes a misdemeanor in Tennessee: Tennessee Code Annotated 35-5-107 (Appendix D). This statutory scheme prohibits any form of personal notice or hearing to an individual before their property is sold, and, as reflected in Tennessee Code Annotated 35-5-107, makes a party failing to follow this methodology guilty of a crime on failing to follow the statute's provisions of constructive notice alone. These statutory provisions apply to sales on enforcement of a lien claim, as well as to a sale under judicial orders or process.

Overton Manor purchased plaintiff's condominium unit from its own trustee, Respondent, Eugene G. Douglass, for $3,190.62 at the foreclosure sale. The trustee's deed executed by Respondent, Eugene G. Douglass, to Overton Manor recites that a mortgage debt to Respondent, Tennessee Housing Development Agency, was assumed by Overton Manor. Plaintiff's complaint recites that his condominium was worth at least $24,000.00.

The court of Appeals set forth that the foreclosure of petitioner's property happened pursuant to a private agreement between Respondents, Eugene G. Douglass and Overton Manor, in accordance with a Master Deed held by Overton Manor (Court of Appeals, Opinion, Page Two); however, petitioner was not a party to the Master Deed. In Tennessee, a Master Deed has its source or origin in Tennessee Code Annotated 66-27-107 (Appendix E hereto).

The lien involved here is one created by Tennessee Code Annotated 66-27-116 (Appendix E) which makes condominium assessments a statutory lien on petitioner's unit. Until the passage of the Tennessee Horizontal Property Act in 1963, no such lien existed in Tennessee.

Immediately following the foreclosure and sale of plaintiff's condominium unit to Overton Manor, Respondent, Eugene G. Douglass filed a Forcible Entry and Detainer action in the General Sessions Court of Shelby County, Tennessee against petitioner and obtained a judgment for the possession of plaintiff's condominium unit against him and plaintiff's condominium tenant on April 27, 1984.

BEST AVA

No issues were advanced by any of the Respondents below that the petitioner did not have a constitutionally protected interest in his property.

At the time of the foreclosure, Respondent, National Mortgage Company, was the agent of Respondent, Tennessee Housing Development Agency, with respect to the servicing and collection of the mortgage debt held on petitioner's condominium by the Tennessee Housing Development Agency. Petitioner had added these two respondents to this action on the basis that, as State agents, they had returned petitioner's mortgage payments to him as further significant encouragement or sanction of the assessment lien foreclosure by Respondent, Overton Manor, and its foreclosing trustee, Eugene G. Douglass. In the District Court, all parties moved for summary judgment in their favor, or, as to Respondents, to dismiss.

In essence, the courts below accepted the contention of the respondents that no significant state action was involved in the taking of petitioner's property so as to invoke the due process clause of the Fourteenth Amendment and the sanctions of 42 U.S.C. Section 1983 in the taking of petitioner's property. The Court of Appeals relied upon the holding in *Hoffman v. U.S. Department of H.U.D., et. al.,* 371 F. Supp. 576 (N.D. Tex. 1974), and its own case of *Northrip v. Federal National Mortgage Ass'n.*, 527 F. 2d 23 (6th Cir. 1975) that the foreclosure and taking of property complained of involved merely a private agreement between Respondents, Douglass and Overton Manor (Courts of Appeals Opinion, Page Two, Appendix A).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The decision of the Sixth Circuit is contrary with the recent decisions of this Court as to the presence of significant state action, or action under color of state law, in the sale or taking of property.

A

Petitioner earnestly submits that the holding of the Sixth Circuit Court of Appeals in this case is in conflict with the principles of state action, or action under color of law, that were established in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d. 482 (1982). The taking of petitioner's property is fairly attributable to the State of Tennessee and its instrumentalities in examining the two part approach to this question on "fair attribution" set forth in *Lugar* (at p. 937):

ILABLE COPY

1. The homeowners association and its trustee , Mr. Douglass, have caused the deprivation by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state, or by a person for whom the state is responsible. This is so because:

(a) the State of Tennessee has created the statutory right to a Master Deed in the form of Horizontal property ownership so as to enable the respondent homeowners association and its trustee, Eugene G. Douglass, to foreclose and take the petitioner's property by the agreement of these respondents without due process of law. Whether or not the Master Deed between these respondents either did, or did not, set forth the manner by which notice would be directed in publication alone to petitioner that his condominium would be sold at foreclosure, the fact remains that Overton Manor exactly followed T.C.A. 35-5-101 to "notify" petitioner by publication alone that he would be faced with a foreclosure on the dispute between these parties over what amount the petitioner may have owed for condominium assessments. This manner of "notification" is a rule of conduct imposed by the State of Tennessee because T.C.A. 35-5-107 makes Overton Manor guilty of a crime under Tennessee law had it had followed the provisions of T.C.A. 35-5-101.

It is difficult to imagine a more compelling reason to "notify" petitioner on an unconstitutional basis that his property would be sold other than the simple reason that Overton Manor would subject itself to criminal prosecution in Tennessee, had it not followed this means of "notice" to petitioner of the sale, and with no pre-deprivation hearing to him whatever. Even if the "private agreement" between Respondents, Overton Manor and Douglass, contained this statutory mandate of constructive notice alone, such was obviously compelled by the act, or statutory scheme, established by the State of Tennessee. These features of Tennessee's statutory scheme employed of foreclosure by power of sale thus provided the "something more" alluded to by the majority in *Lugar*, (at p. 942) to take advantage of this statute and sell petitioner's property without any notice to him.

This statute also commands a form of sale to also meet the view of Mr. Justice Powell's dissent in *Lugar*, (at p. 949) that the State be responsible for a private decision to behave in a certain way and avoid being prosecuted in a criminal proceeding.

(b) The actions of Overton Manor and its Trustee were fostered, encouraged or compelled through One Hundred and Fifty (150) years of rulings of the Tennessee Supreme Court to use foreclosure by power of sale in lieu of a judicial foreclosure; *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tennessee Law Review 279, 314, (Winter Issue, 1984). Professors Jones and Ovens have plainly demon-

strated in this law review article how the courts of Tennessee have directed and significantly encouraged creditors and trustees not to utilize a judicial foreclosure because of the time, extra expense, or penalties that would otherwise result to them. Moreover, this article reflects (at. pp. 288 and 293) how much easier it is to sell a person's property without them even knowing about it. The record in this case shows that Overton Manor's trustee "complied with the applicable state law", as well as the applicable sections of the master deed. (R. 26, Affidavit of Respondent, Eugene G. Douglass). As a licensed attorney in Tennessee, Mr. Douglass would obviously be charged with the knowledge of Tennessee jurisprudence on power of sale foreclosure.

The complaint of petitioner in the District Court (Paragraph 12) alleged the procedural customs, statutes, usage and law of Tennessee in the taking of his property were unconstitutional under the Fourteenth Amendment to also meet the first of *Lugar's* two part test (p. 941) that the state's procedural scheme was the product of state action.

2. Overton Manor and its trustee may fairly be said to be state actors because the trustee, Mr. Douglass, is acting as a state official under Tennessee Code Annotated 35-5-101 to advertise and sell petitioner's property in the same manner as a constable or sheriff with a writ of execution in his hands [T.C.A. 35-5-101 (a)]; *Doty v. Federal Land Bank of Louisville*, 169 Tenn. 496, 89 S.W. 2d 337. Moreover, these two respondents had acted together with or obtained significant aid from state officials, (*Lugar*, p. 937), namely, the General Sessions Court of Shelby County, Tennessee in awarding Overton Manor a judgment for the possession of petitioner's condominium, and The Tennessee Housing Development Agency, which returned petitioner's mortgage payments to him through its agent, National Mortgage Company.

Once Overton Manor had foreclosed petitioner's condominium without notice to him, it then filed an action of forcible entry and detainer in the General Sessions Court to evict petitioner and his tenant. Under Tennessee's statutory scheme on this, petitioner had no right whatever to contest the validity of the title obtained by Overton Manor from the foreclosure; see 29-18-119, Tennessee Code Annotated, (Appendix G); *Round Mountain Lumber & Coal Co. v. Bass* 136 Tenn. 687, 191 S.W. 341; *Metropolitan Insurance Co. v. Moore*, 167 Tenn. 620, 72 S.W. 2d 1050. State court action thus precluded petitioner from even having any chance to a fair hearing on this aspect of the taking of his property rights in the General Sessions Court.

B

Petitioner submits that this case also demonstrates a marked

distinction from the facts and law applicable in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 in that:

(a) Tennessee's statutes and case law here obviously involve "something more" than a simply permissive Uniform Commercial Code means to enforce a warehouse lien. There is certainly no "total absence of overt official involvement" as in *Flagg Brothers*. The trustee Respondent, Eugene G. Douglass, is also performing a public function in the same manner as a constable or sheriff in Tennessee. A Tennessee court, or trustee, would both be acting to sell property under T.C.A. 35-5-101, and thereby "have in common the feature of exclusivity" (*Flagg Brothers*, p. 159).

(b) One other aspect of *Flagg Brothers* that was pursuasive to the majority of the court was that the property owners had state remedies available to them to recover for the loss of their property. Petitioner Williams has no right in Tennessee however to redeem his property under Tennessee Code Annotated 66-8-101 (Appendix F). Redemption of property from a condominium lien assessment foreclosure is not one of the four (4) designated instances in which Mr. Williams could even redeem his property within two (2) years. Not only is the loss of property rights an enormous one for petitioner, he is precluded by this Tennessee statute from ever redeeming his property from the sale.

(3)If the petitioner "again illegally possesses himself of the premises", he can even be guilty of a misdemeanor, (Appendix G, T.C.A. 29-18-133).

C

The reliance of the Court of Appeals upon *Northrip v. Federal National Mortgage Ass'n.*, 527 F. 2d 23 (6th Cir. 1975), and *Hoffman v. U.S. Dep't of H.U.D., et. al.*, 371 F. Supp. 576 (N. D. Tex. 1974) is misplaced in that both of these cases involved a consensual mortgage or trust deed arrangement by which the property owner executed the mortgage and consented that their property might be taken in the foreclosures of which complaint was made. Petitioner here was not a party to the master deed; nor did he execute the lien assessment that was foreclosed by Overton Manor. The foreclosure here was the product of an agreement between Respondents, Overton Manor and Douglass, through the state created master deed and Horizontal Property Act of 1963 in Tennessee.

The Sixth Circuit's reliance on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142, to support its opinion is likewise misplaced. Like the dissent of Mr. Justice Powell in *Lugar*, the Sixth Circuit disregarded the substantive count of the complaint in *Adickes*

with respect to a "custom of the community to segregate the races in public eating places", (*Lugar*, Note 15, p. 933), and the fact that a private party becomes a state actor when that person's conduct is in concert with a state official, or in response to a state law or custom that compels the offensive conduct.

Not only do the holdings of *Northrip* and *Hoffman*, appear to have been superceded by the principles of state action of *Lugar*, the concern of one writer that *Flagg Brothers* threatened "to emasculate the significant state involvement test" appears to have been premature in the light of the court's return to an examination of the significance of the state's involvement and its effect on private ordering as initiated in *Smith v. Allwright*, 321 U.S. 649 (1944); *Creditors' Remedies as State Action*, 89 Yale Law Journal 538 (1979-80); *Lugar*, pp. 931, 932.

The Second Circuit has indicated that the rationale of *Lugar* is not limited to cases involving prejudgment attachments; *Texaco, Inc. v. Pennzoil Co.*, 784 F. 2d 1133, (February, 1986). Petitioner would urge that the rationale of *Lugar*, should not be excluded from application to Tennessee's unconstitutional scheme in the taking of property by power of sale methodology either.

II. The magnitude of the loss, forfeiture or taking of housing or property in Tennessee, and other states, by power of sale methodology amounts to a confiscation of property by state action, or action under color of law, of such immense proportions so as to warrant the court's examination of the question presented here.

There is little, if anything, that the average citizen in this country ever hopes to purchase or acquire in their lifetime that is greater in monetary value than a residence or condominium. The exhaustive study of Professors Jones and Ivens reflects that at least thirty-two (32) states of the nation utilize or sanction the taking of property by power of sale methodology; *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tennessee Law Review, 279, 293-295. Only two (2) jurisdictions, North Carolina and Colorado, even provide for any type of hearing at all before a person's property is sold in this manner. The survey of these two gentlemen of just Tennessee cases reflects the staggering deprivation and forfeiture that Tennessee permits a property owner to suffer; moreover, the cases cited glaringly expose the immensity of the loss that a property owner can sustain with little or no notice or hearing at all before being stripped of their property rights. In the

case of Mr. Williams, the deprivation is not only total, but permanent, and with no right to redeem the property at all.

As recently as *Albin v. Union Planters Bank*, 660 S.W. 2d 784, (Tenn. App. 1983), the courts of Tennessee have again evidenced their longstanding view that a foreclosure sale price must still shock the conscience of a Tennessee court in order to be set aside. It appears to matter little that the property owner will have many times lost their entire equity in the property either.

Even in jurisdictions where there may be some form of judicial supervision over lien or mortgage foreclosures, one writer has recently suggested that foreclosure by sale is, in many instances, a meaningless charade or meaningless ceremony; *Through the Looking Glass: Foreclosure By Sale As De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, by Steven Wechsler, 70 Cornell Law Review, 850-900, June 1985. It is not difficult to recognize how much more at risk a property owner can be to suffer a total loss of their property in Tennessee as Petitioner, Bernard L. Williams, who has absolutely no other recourse or haven to which he can appeal than a federal court.

The loss of petitioner's property rights, commanded, encouraged and sanctioned by the state here, is no less important than the voice of the state that would direct segregated service in a public restaurant; *Turner v. City of Memphis*, 369 U.S. 350, 82 S. Ct. 805, 7 L. Ed. 2d 762; *Lombard v. State of Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338.

Although the Circuit Courts that have faced the issue of state action in the context of power of sale foreclosure in strictly mortgage or trust deed cases have found no state action in these procedures, Professors Jones and Ivens have indicated that this court has never faced a direct challenge to a power of sale foreclosure on due process grounds; *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tennessee Law Review, 279, 283. Professors Jones and Ivens show that the law reviews of the nation conflict as to whether or not state action exists in a power of sale foreclosure (p. 284, 285). Petitioner's application in this cause to the court would thus present a case of first impression on the state action issue in power of sale lien foreclosures.

Since the state action issue must first be determined, petitioner has not dealt with the notice or pre-deprivation hearing issues at any length. At this point it is sufficient to recognize that the procedures employed in the taking of petitioner's property clearly violate the principles enunciated in *Mullane v. Central Hanover Bank and Trust*

Co., 339 U.S. 306 (1950); *Greene v. Lindsey*, 456 U.S. 444 (1982); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 and *Boddie v. Connecticut*, 401 U.S. 371 on these issues. Perhaps the rationale of Mr. Justice Harlan in his concurring opinion on *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, more aptly demonstrates just how futile a position in which petitioner was placed in being subjected to the loss of his property:

> "I think that due process is afforded only by the kind of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property" . . . Id. at 343, 89 S. Ct. at 1823.

The stark reality of petitioner's plight is that he never got any opportunity whatever to present his evidence on the validity of Overton Manor's underlying claim before his property was lost forever.

CONCLUSION

For all of the foregoing reasons, Petitioner, Bernard L. Williams, prays that a writ of certiorari issue to review the judgement and decision of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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Bernard L. Williams

APPENDIX A

NOT RECOMMENDED FOR FULL TEXT PUBLICATION.

No. 85-5833

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERNARD L. WILLIAMS,

Plaintiff-Appellant

v.

OVERTON MANOR EAST HOMEOWNERS ASSOCIATION, INC., EUGENE G. DOUGLASS; TENNESSEE HOUSING DEVELOPMENT AGENCY; and NATIONAL MORTGAGE COMPANY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Before: MARTIN and JONES, Circuit Judges; and COHN*, District Judge.

PER CURIAM. Plaintiff Bernard Williams appeals the district court's judgement dismissing his civil rights action challenging the constitutionality of Tennessee's foreclosure laws. Because we find no significant state involvement in the foreclosure proceedings assailed here we affirm the judgement below.

Mr. Williams purchased a condominium in Memphis, Tennessee in 1975. The property was encumbered by a mortgage originally held by

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*** The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.**

defendant, National Mortgage Company, and later assigned to defendant, Tennessee Housing Development Agency. Defendant, Overton Manor East Homeowner's Associations, Inc., was in charge of the administration of Williams' unit, which included the assessment of regular maintenance fees. Overton Manor had recorded a master deed which granted it a power of sale and the right to foreclose on condominiums whose owners defaulted on payment of their assessments.

In August of 1983, Overton Manor determined that Williams was delinquent in the payment of his fees and retained defendant Eugene Douglass to prepare a Notice of Lien. The notice was allegedly sent to Williams at the address of his condominium. Several months later Douglass sent Williams a letter advising him that he had been authorized by Overton Manor as trustee to foreclose if the fees were not paid in seven days. Two similar letters were sent at later dates but Williams never responded. On February 29, March 7, and March 13, 1984, a Notice of Trustee's Sale was published in a local newspaper pursuant to *Tenn. Code* Ann. §35-501 *et seq. (current version of Tenn. Code Ann.* §35-5-101 *et seq.*). On March 22, 1984, the property was sold to Overton Manor as sole bidder. Shortly thereafter Douglass notified Williams of the sale, and a state court issued a forcible entry and detainer warrant. Williams then brought suit seeking a declaratory judgement and damages under 42 U.S.C. 1983.

In order to establish a claim under section 1983 Williams must prove that defendants deprived him of a right secured by the "Constitution and laws" of the United States, and that defendants deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory." *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). While Williams lost his property, state action is clearly absent from this case. The foreclosure on Williams property happened pursuant to a private agreement between Douglass and Overton Manor, and in accordance with Overton Manor's Master Deed. Williams urges that the actions of Overton Manor and Douglass are properly attributable to the State of Tennessee because the state authorized them in enacting Sections 35-501 *et seq.* The law is clear, however, that a state is responsible for the act of a private party only when the state has compelled the act. *Adickes*, 398 U.S. at 170. The Tennessee statute in question is regulatory in nature and merely allowed the foreclosure of Williams' property. It did not compel the foreclosure. Foreclosure proceeding of this kind are clearly constitutional. *See Northrip v. Federal National Mortgage Ass'n.*, 527 F.2d 23 (6th Cir.

1975); and *Hoffman v. U.S. Dep't of H.U.D., et al.*, 371 F. Supp. 576 (N.D. Tex. 1974).

Finally, we note that the other defendants had nothing to do with the foreclosure. Tennessee Housing Development Agency merely held the first mortgage on the property. Similarly, National Mortgage Company was only the assignee of this mortgage. No state action arises from these activities.

Williams' other arguments are without merit.

This judgement of the district court is affirmed.

ISSUED AS MANDATE: 10/8/86
COST: none

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

NO. 84-2903-MB

BERNARD L. WILLIAMS,
Plaintiff

-vs-

OVERTON MANOR EAST HOMEOWNERS ASSOCIATION, INC., et al.,
Defendants

ORDER OF DISMISSAL

This is an action brought pursuant to 42 U.S.C § 1983, wherein plaintiff alleges that he was deprived of his property without due process, in violation of his rights under the fourteenth amendment. Jurisdiction is asserted under 28 U.S.C § 1343, and there is no diversity of citizenship.

Plaintiff purchased a condominium in 1975. For nearly the entire period of his ownership of the property, plaintiff leased the condominium to residential tenants. The property was encumbered by a mortgage originally held by defendant National Mortgage Company (NMC) and subsequently assigned to defendant Tennessee Housing Development Agency (THDA) by instrument dated December 26, 1976. NMC thereafter acted as servicing agent on behalf of THDA. Defendant Overton Manor East Homeowners Association, Inc. (OMEHA) was charged with the administration of the condominium complex of which plaintiff's unit was a part. It had recorded the Master Deed Establishing Horizontal Property Regime. The Master Deed granted OMEHA a power of sale and the right to foreclose upon condominiums whose owners were found to be in default in the payment of their assessments.

In August of 1983, OMEHA determined that plaintiff was delinquent in the payment of his assessments and retained defendant Eugene Douglass (Douglass) to prepare a notice of lien on plaintiff's property,

which was prepared on August 22, 1983. The notice was sent to plaintiff at 3046 St. Denis Place, Memphis, Tennessee, the address of plaintiff's condominium. On January 27, 1984, Douglas sent plaintiff a letter advising him that he, Douglass, had been authorized by OMEHA to foreclose on the condominium for failure to pay back assessments and other fees and expenses due. The letter gave plaintiff seven days in which to pay. On February 6, 1984, Douglass sent plaintiff a second letter, plaintiff not having responded to the letter of January 27. The second letter informed plaintiff that Douglass was prepared to institute foreclosure proceedings, but gave plaintiff one last chance to pay. On February 19, 1984, Douglass send a third letter to plaintiff, containing a copy of the Notice of Trustee's sale which was being forwarded to the Daily News for publication. Again, this letter allowed plaintiff a last chance to avoid foreclosure by paying the amount due, plus fees and expenses. Apparently, plaintiff did not respond, and the notice was published in the Daily News on February 29, March 7, and March 13, 1984, pursuant to *Tenn. Code Add.* §35-501 *et seq. (current version of Tenn. Code Add.* §35-5-101 *et seq.)*. The property was sold to OMEHA as sole bidder on March 22, 1984. On March 26, 1984, Douglass notified plaintiff of the sale. On April 27, 1984, a Forcible Entry and Detainer Warrant, issued by the Court of General Sessions of Shelby County, was served upon plaintiff's tenant, who continued to occupy the premises after the sale.

The complaint fails to state a colorable claim under the fourteenth amendment and must be dismissed for lack of subject matter jurisdiction, pursuant to *Fed. R. Civ. P.* 41 (b). State action sufficient to confer jurisdiction upon this Court is absent. The power of sale executed by Douglass on behalf of OMEHA was contractual and was executed pursuant to the provision of the Master Deed. The lien was foreclosed extrajudicially. Therefore, despite the presence of a Tennessee statute which prescribes the mechanisms for the execution of a power of sale by a trustee, the action is deemed to have been taken pursuant to the private agreement between the parties. *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974).The involvement of THDA, a government agency, is simply fortuitous. The first mortgage on the property, held by THDA, was not affected by the proceedings instituted by OMEHA. THDA had no role whatsoever in the foreclosure and sale. Even had the state been involved somehow, the fact that self help was taken pursuant to a private agreement would render it private rather than state action. *See Northrip v. Federal National Mortgage Ass'n*, 527 F.2d 23 (6th Cir. 1975). The only action involving state officials, the issuance of the

APPENDIX B

Forcible Entry and Detainer Warrant, was taken after plaintiff's interest in the property had been extinguished; he was not even in possession of the property, and the only one affected by the execution of the warrant was plaintiff's former tenant.

In any event, this Court holds as a matter of law that the notice provided in this instance was more than sufficient. Plaintiff was notified no less than three times that he was in default in his obligation to pay assessments and that foreclosure was imminent. The notices were sent to plaintiff's address at Overton Manor East. Plaintiff's failure to pick up his mail at the condominium is apparently the only logical explanation for his failure to receive the notification sent; plaintiff has proffered no other. Plaintiff's lack of vigilance does not detract in any way from the effectiveness of the notices.

Accordingly, this cause is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

ENTER: This 15 day of August, 1985.

ROBERT M. McRAE, JR., U.S. District Judge

APPENDIX C

42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX D

35-5-101, Tennesee Code Annotated, TWENTY DAYS' NOTICE BY PUBLICATION.—

(a) In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of such sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made.

(b) The first publication shall be at least twenty (20) days previous to the sale.

(c) The provisions of this section shall not apply where the amount of indebtedness for the payment of which the property being sold does not amount to more then two hundred dollars ($200) in which event the owner of the property may order that advertisement be made by written notices posted as provided in T.C.A. 35-5-103, instead of by notices published in a newspaper.

(d) Nothing in this section shall be construed as applying to any notice published in accordance with any contract entered into heretofore, and expressed in a mortgage, deed of trust, or other legal instruments. [Code 1858, Sect. 2145 (deriv. Acts 1855-1856, ch 83, Sect. 1); Acts 1859-1860, ch. 60; Shan., Sect. 3838; mod. Code 1932, Sect. 7793; Acts 1957, ch. 41, Sect. 1; T.C.A. (orig. ed.), Sect 35-501.]

35-5-107, Tennessee Code Annotated, EFFECT OF NONCOMPLIANCE WITH CHAPTER.—

Any such officer, or other person, who fails to comply with the provisions of this chapter, is guilty of a misdemeanor, and punishable accordingly, and is, moreover, liable to the party injured thereby, for all damages resulting from the failure. [Code 1858, Sect. 2153 (deriv. Acts 1855-1856, ch. 83, Sect. 5); Shan., Sect. 3846; Code 1932, Sect. 7801; T.C.A. (orig. ed.), Sect. 35-508.]

APPENDIX E

66-27-107, Tennessee Code Annotated. RECORDATION AND CONTENTS OF MASTER DEED.—(a) A master deed or lease shall be recorded in the same manner and subject to the same provisions of law as are deeds. Plats may likewise be recorded as in the case of recordation of plats as provided by law.

(b) A master deed or lease or the plat, or any combination of them, to which Section 66-27-103 refers shall express the following particulars:

(1) The description of the land, whether leased or in fee simple, and the building, expressing their respective areas;

(2) The general description and number of each apartment, expressing its area, location and any other data necessary for its identification;

(3) The description of the general common elements of the building and the limited common elements of the building; and

(4) Bylaws for the administration of the building as in Sections 66-27-111, 66-27-112 provided.

(c) The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition of division of coownership.
[Acts 1963, ch. 124, Sect. 7; T.C.A. Section 64-2707.]

66-27-116, Tennessee Code Annotated. PRORATED EXPENSES AND TAXES-LIEN.—The sale or conveyance of an apartment shall in all cases be subject to all unpaid assessments against the owner thereof for his pro rata share in the expenses to which Section 66-27-114 refers and, if the same are not paid by the owner thereof prior to sale or conveyance, shall be a lien against the apartment and shall be paid by the new owner thereof. Likewise shall taxes and all other levies and assessments by governmental taxing bodies be a lien against individual apartments. [Acts 1963, ch 124, Sect. 16; T.C.A., Section 64-2716.]

APPENDIX F

66-8-101, Tennessee Code Annotated. RIGHT OF REDEMPTION-WAIVER.—Real estate sold for debt shall be redeemable at any time within two (2) years after such sale:

(1) Where it is sold under execution;

(2) Where it is sold under any decree, judgment, or order of a court of chancery, whether founded upon a foreclosure of a mortgage, or deed of trust, or otherwise, unless, upon application of the complainant, the court orders that the property be sold on a credit of not less than six (6) months, nor more than two (2) years; and that, upon confirmation thereof by the court, no right of redemption or repurchase shall exist in the debtor or his creditor, but that the title of the purchaser shall be absolute;

(3) Where it is sold under a deed of trust or mortgage without a judicial sentence, unless the right of redemption is expressly waived by the deed or mortgage; and a waiver of the "equity of redemption," or a waiver using words of similar import, shall be sufficient to waive the right of redemption afforded by this section in all deeds of trust and mortgages, whether heretofore or hereafter existing; and

(4) Where it is sold for taxes. [Code 1858, Sect. 2124 (deriv. Acts 1820, ch. 11, Sect. 2; 1823, Ch. 24, Sect. 2; 1832, ch. 36, Sections 1, 2; 1833, ch. 47, Sect. 2; 1842 (E.S.), ch. 6, Sect. 3; 1857-1858, ch. 46,. Sect. 1); Shan., Sect. 3811; mod. Code 1932, Sect. 7736; mod. C. Supp. 1950, Sect. 7736; T.C.A. (orig. ed.), Sect. 64-801; Acts 1984, ch. 774, Sect. 1.]

APPENDIX G

29-18-119, Tennessee Code Annotated. MANNER OF TRIAL-TITLE NOT INQUIRED INTO—(a) The cause shall be tried at the time and place designated, by a single general sessions judge, without the intervention of a jury, and in all respects like other civil suits before the court of general sessions.

(b) The general sessions judge will try every case upon its merits, without regard to matters of form, and ascertain whether the plaintiff or defendant is entitled to the possession of the premises agreeably to the laws governing such cases, and give judgement accordingly.

(c) The estate, or merits of the title, shall not be inquired into. [Code 1858, Sections 3353, 3354; (deriv. Acts 1821, ch. 14, Sect. 20 and Acts 1841-1842, ch. 186, Sections 9256, 9257; impl. am. Acts 1879, ch. 68, Sect. 3; T.C.A. (orig. ed.), Sections 23-1619, 23-1620.]

29-18-133, Tennessee Code Annotated. PENALTY FOR RESUMING POSSESSION.—(a) A person, once dispossessed by action, who again illegally possesses himself of the premises, is guilty of a misdemeanor, and, on conviction, shall be fined not less than five dollars ($5.00) nor more than fifty dollars ($50.00), and be imprisoned not less than two (2) nor more than ten (10) days.

(b) The only evidence, required or admitted on the trial of the criminal charge is that the defendant was turned out of possession by action brought for the purpose, and that he has again taken possession of the premises. [Code 1858, Sections 3370, 3371 (deriv. Acts 1825, ch. 63, Sect. 3); Shan., Sections 5120, 5121; Code 1932, Sections 9275, 9276; (orig ed.), Section 23-1635.]

APPENDIX H

Constitution of the United States, Fourteenth Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.